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ABSTRACT

Two hundred fourteen journalism students responded to a questionnaire designed to test the extent of the disparity between journalistic attitudes toward law and ethics in the area of invasion of privacy by photography in both print and broadcast media. The survey instrument presented eight cases in which allegations of media invasion of privacy were tested in the courts, and responses to questions about the cases were analyzed according tc sex, classification (upperclass/lowerclass), and subject (ethics/law/photojournalism/feature writing/mass communications). Results indicated that there was a pronounced dichotomy between media law and media ethics in which journlaistic conduct was more often seen as legal than as ethical. The findings suggest that journlaists are more likely to condemn one another than to be condemned by jurists. (The questionnaire and a summary of the eight court cases referred to are appended.) (AEA)

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JOURNALISTIC SCHIZOPHRENIA
THE LAW/ETHICS DICHOTOMY

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JOURNALISTIC SCHIZOPHRENIA: THE LAW/ETHICS DICHOTOMY

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INTRODUCTION

Journalists are an ambivalent lot: on the one hand they loudly assert their rights under the First Amendment to pursue stories without interference from pressure groups or civil authorities; on the other hand they freely accuse one another of base motives and loose means in pursuit of those stories. As a teacher of classes in media law and in media ethics I often have been struck by this display of journalistic schizoprenia, and in collaboration with Dr. E. Joseph Broussard I devised an instrument to test the extent of the disparity between journalistic attitudes towards law and ethics. We choose to focus on invasion of privacy by photography because it seemed to be an area in which these attitudes are more clearly defined or strongly felt.

PROCEDURE

We decided that the survey instrument should test attitudes towards invasions of privacy by both print and broadcast media, and that each of the four torts, or injuries, which together compose privacy law, should be represented in the survey instrument. Accordingly we chose eight cases in which allegations of media invasion of privacy were tested in the courts; each of the four torts was represented by two cases: one involving alleged photographic invasion of privacy by television, and one by newspapers or magazines. Thus there are two cases which illustrate alleged invasion of

privacy by unreasonable intrusion upon another's seclusion, two cases which illustrate alleged unreasonable public disclosure of private facts, two cases which illustrate alleged unreasonable publicity which places another in a false light, and two cases which illustrate alleged appropriation of another's name or image; and one case in each pair involves broadcasters, the other involves print journalists.

We devised a questionnaire which summarized the facts in each case, or situation, and then we posed two questions relating to each situation: Were the journalists acting legally? Were the journalists acting ethically?

The questionnaires were administered to 214 students enrolled in journalism classes at Louisiana State University.[1] Their responses were analyzed according to sex (male/female), classification (upperclass/lowerclass), and subject (ethics/law/photojournalism/feature writing/mass communications) for purposes of comparison. The results are shown in tables below.

The questionnaire itself is reproduced as Appendix A. Summaries of the eight cases, complete with legal citations, have been included as Appendix B.

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[1]Identical questionnaires were sent to randomly selected working journalists in four categories: television news directors, television news photographers, newspaper editors, and newspaper photographers. Questionnaires were also sent to randomly selected journalism educators. Responses to these questionnaires required additional demographic data such as age, education, geographic location, and experience with privacy complaints. These responses, returned over a period of several months, are presently being tabulated by computer and will be reported in later studies. We plan to enlarge the scope of this investigation to include attitudes towards legal/ethical aspects of verbal invasion of privacy and, still later, attitudes towards legal/ethical aspects of libel.

FINDINGS

Our findings are summarized in six tables.

Table No. 1 shows responses to questions of law, divided by upperclass/lowerclass and analyzed according to whether the responses matched the actual court decision in a similar situation. Such an analysis provides a means by which to evaluate the respondents' knowledge of the law. We found that with the exception of two situations, the upperclassmen were able to choose the correct response, and that the lowerclassmen chose the correct response in every situation but one—and in that one they were evenly divided.

TABLE No. 1

UPPERCLASS/LOWERCLASS RESPONSES TO QUESTIONS OF LAW
ANALYZED BY RIGHT/WRONG

Situation	Upperclassmen		Lowerclassmen		Mean	
	right	wrong	right	wrong	right	wrong
A	35.0	65.0	55.3	44.7	45.2	54.8
B	63.0	37.0	70.2	29.8	66.6	33.0
C	86.9	13.1	84.2	15.8	85.6	14.4
D	69.7	30.3	71.1	28.9	70.4	29.6
E	62.0	38.0	56.1	43.9	59.1	40.9
F	89.0	11.0	75.4	24.6	82.2	17.8
G	26.3	73.7	50.0	50.0	38.2	61.8
H	83.8	16.2	78.1	21.9	81.0	19.0

The column on the right, showing the mean right/wrong responses, reveals that the majority of all respondents chose incorrectly only twice—in situation A and in situation G, both of which involve journalists in public accommodations and no insinuation of sex or crime. In such situations it would be reasonable for a journalist to believe he would bear no liability for taking pictures. But in similar, real-life situations, a court found journalists subject to trial for invasion of privacy. Thus the incorrect responses here are no surprise.

Because some of the fact situations do involve sexual matters, we decided to divide the respondents by sex and to reexamine the data by

percentage of right/wrong responses. Such an analysis provides a means of determining whether sexual bias has skewed the responses. We found that male respondents answered incorrectly only twice, that female respondents answered incorrectly only twice, and that in both groups the incorrect answers were in response to the same fact situations: A and G. Table No. 2 displays this analysis.

TABLE No. 2

MALE/FEMALE RESPONSES TO QUESTIONS OF LAW
ANALYZED BY RIGHT/WRONG

Situation	Male		Female		Mean	
	right	wrong	right	wrong	right	wrong
A	41.0	59.0	48.4	51.6	44.7	55.3
B	70.5	29.5	64.8	35.2	67.7	32.3
C	89.7	10.3	82.7	17.3	86.2	13.8
D	73.1	26.9	69.5	30.5	71.3	28.7
E	65.4	34.6	57.0	43.0	61.2	38.8
F	80.8	19.2	82.0	18.0	81.4	18.6
G	34.6	65.4	39.4	60.6	37.0	63.0
H	74.4	25.6	84.3	15.7	79.4	20.6

The greatest variance in male/female responses may be seen in situation H, which is the most overtly sexual of all the fact situations. The variance amounts to approximately ten percentage points, but both groups were agreed that a court would find for the plaintiff. We felt, therefore, that sexual bias played no role in distorting the data.

We decided to subject the data to one additional test, an analysis by class subject. Of the seven classes in which the questionnaire was administered, three were studying subjects directly related to the questionnaire: ethics, law, and photojournalism. Such an analysis provides a means of determining whether the students' responses have been skewed by their current classroom interest or by a point of view propounded there. We found that situations A and G again provided the greatest difficulty for

all respondents. A majority of respondents in each class failed to choose the correct response in both situations, although the photojournalism students were evenly divided in situation A. Table No. 3 shows the responses.

TABLE No. 3

ETHICS/LAW/PHOTOJOURNALISM RESPONSES
TO QUESTIONS OF LAW ANALYZED BY RIGHT/WRONG

Situation	Ethics		Law		PhotoJ		Mean	
	right	wrong	right	wrong	right	wrong	right	wrong
A	33.3	66.7	24.5	75.5	50.0	50.0	35.9	64.1
B	66.7	33.3	65.3	34.7	61.1	38.9	64.4	35.6
C	83.4	16.6	89.8	10.2	77.7	22.3	83.6	16.4
D	62.5	37.5	71.4	28.6	77.7	22.3	70.5	29.5
E	45.8	54.2	65.3	34.7	77.7	22.3	63.6	36.4
F	79.2	20.8	93.9	6.1	83.3	16.7	85.5	14.5
G	20.8	79.2	22.5	77.5	41.2	58.8	28.2	71.8
H	83.3	16.7	85.7	14.3	88.2	11.8	85.7	14.3

The respondents in the ethics class had a higher percentage of incorrect answers than the mean for all three classes in seven of the eight situations. The respondents in the law class had a higher percentage of incorrect answers than the mean in only two of the eight situations, and those in the photojournalism class had a higher percentage than the mean in three of the eight. One could reasonably infer that the ethics students were applying ethical values to questions of law, suggesting existence of the journalistic schizophrenia hypothesized at the beginning of this paper.

Setting aside the question of whether the journalism students' understanding of the law coincided with the reality of court decisions (as the tables show, the students with remarkable consistency agreed with the courts in six of the eight situations and disagreed in the other two) we now set out to determine whether, in the opinion of the respondents, the journalists in the eight situations had acted legally. This we were able to discover by applying a yes/no analysis instead of the right/wrong analysis.

Satisfied that we had discovered no bias in the subgroups (upperclass/lowerclass, male/female, class subject) within our sample, we decided to analyze all responses as a unit. On the original instrument, each of the eight fact situations was followed by two questions: the first asked if the journalist (TV cameraman, newspaper photographer, magazine photographer) had invaded the subject's privacy; the second asked if the journalist had acted ethically. Table No. 4 shows responses to the first question for each situation.

TABLE No. 4

DID THE JOURNALIST INVADE THE SUBJECT'S PRIVACY?

Situation	All Respondents	
	yes	no
A	45.8	54.2
B	33.2	66.8
C	14.6	85.4
D	29.6	70.4
E	41.1	58.9
F	81.8	18.2
G	38.0	62.0
H	80.8	19.2
Mean	45.6	54.4

In only one of the fact situations do the respondents show an appreciable degree of uncertainty about whether the subject's privacy has been invaded. This is the troublesome situation A, one of the two situations in which the students consistently disagreed with the court's decision. In situation E the students are somewhat more decisive, with eighteen percentage points separating those who feel there is no invasion of privacy from those who hold a minority opinion. In the other six fact situations, the respondents approach or exceed a two-to-one majority, reflecting what might be considered a rather confident view of what constitutes an invasion of privacy. That level of belief exceeds eighty percent in three of the fact situations and

represents a remarkable degree of unanimity in what is regarded by many as an unsettled area of the law.

The next step was to ask the second question: Did the journalist act ethically? Responses to this question, when compared with the responses to the last question (Did the journalist invade the subject's privacy?) should tell us whether there is a divergence of opinion—journalistic schizophrenia, if you will—regarding media law and media ethics. Table No. 5 displays the responses to the ethics question for all situations.

TABLE No. 5

DID THE JOURNALIST ACT ETHICALLY?

Situation	All Respondents	
	yes	no
A	37.9	62.1
B	37.1	62.9
C	44.9	55.1
D	30.9	69.1
E	41.3	58.7
F	20.6	79.4
G	43.7	56.3
H	12.7	87.3
Mean	33.6	66.4

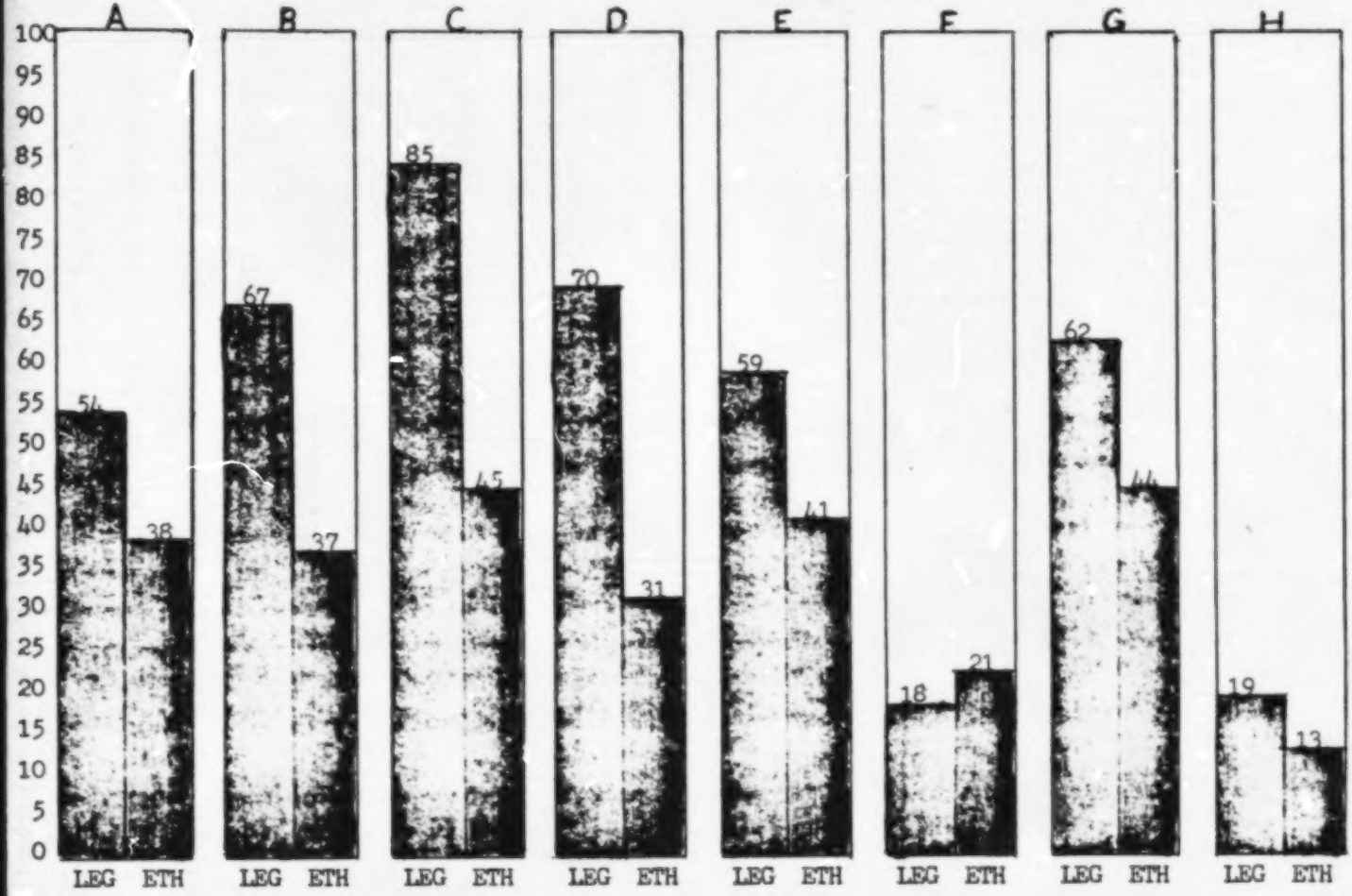
In not one situation—nary an instance—did respondents find the journalist was conducting himself ethically. Phrased conversely for the sake of clarity: In every one of the eight situations, respondents found that the journalists were acting unethically according to standards of journalism. This rather astonishing view is shown even more emphatically in the mean figure for all situations: By a two-to-one majority, respondents found the journalists to be acting contrary to the principles of ethical journalism. In three of those eight situations, the majority exceeded the mean figure—in situation H surpassing eighty-seven percent of the 213 respondents to that question. In situation F the majority exceeded seventy-nine percent, and in situation D

the majority exceeded sixty-nine percent. In two of the remaining situations, A and B, those in the majority outnumbered the minority by nearly twenty-five percent of all respondents. The division of opinion was closest in situation C, where the margin was over ten percentage points in favor of those who felt the journalist had acted unethically.

Tables No. 4 and No. 5, when compared, reveal starkly the divergence of opinion which we have styled "journalistic schizophrenia." In Table No. 4 respondents are shown to be quite settled in their belief that there was no invasion of privacy in six of the eight situations. The aspiring journalists found an invasion of privacy in only two of the eight. In other words, the cameramen, photographers, and publishers were seen to be acting within the law while performing their journalistic role in every situation except F and H. In those two situations, the words "without consent" appear; they appear nowhere else in the questionnaire. One is tempted to speculate that those words were seen as "flag words" which induced the respondents to discover invasions of privacy in those two situations. Otherwise the journalists would have been seen as acting within the law in every instance. Even so, they were seen as acting within the law in six of the eight. Compare that result with the data in Table No. 5, where the journalists were seen as acting unethically in every one of the eight situations. In six of the eight situations, the journalists were acting legally but unethically, according to the respondents. In the remaining two they were seen as acting both illegally and unethically. But the fascinating result of the comparison is the dichotomy between law and ethics revealed in the data. There is clearly a tension between what is seen as legal and what is seen as ethical. This tension is visually depicted in the bar graph on the next page.

THE JOURNALISTS ACTED LEGALLY = LEG.

THE JOURNALISTS ACTED ETHICALLY = ETH.



The bar graph shows clearly that, in the estimation of respondents, conduct of the journalists in these situations is more likely to be legal than ethical in seven of the eight. In only one situation was the legality of journalistic conduct seen as less likely than its morality. Legality, or course, is an issue which can be empirically defined; morality cannot.

CONCLUSION

What we have shown seems clear enough: there is a dichotomy between media law and media ethics. It is a pronounced dichotomy, amounting to journalistic schizophrenia, in which journalistic conduct is more often seen as legal than as ethical. In essence this means that the law is considered more forgiving than one's journalistic peers. Journalists are more likely to condemn one another than to be condemned by jurists.

In a time when First Amendment rights seem to be diminishing in reaction to journalistic excesses, it is instructive to find that journalists themselves are examining more closely their ethical bounds. As Marquis Childs once wrote, "Whatever else one may say about the newspaper business, self-examination is one of its virtues."

Appendix A

Y O U D E C I D E

After reading the hypothetical fact situation, respond to each question by writing the number of the correct response in the proper blank.

A. Following up on a story that a bar illegally serves minors, a TV newsfilm team enters the bar with lights on and cameras rolling while customers scatter or hide. The proprietor orders the team to leave, but for several minutes before leaving the cameraman continues to film.

1. According to principles of law, has the newsfilm team invaded the proprietor's privacy? 1. Yes 2. No 1._____
2. According to standards of journalism, has the newsfilm team acted ethically? 1. Yes 2. No 2._____

B. A newspaper photographer accompanies police with their permission into a burned-out private home and takes a picture of a woman's body. The woman's husband learns of her death when he sees the picture in the newspaper.

3. According to principles of law, has the photographer invaded the husband's privacy? 1. Yes 2. No 3._____
4. According to standards of journalism, has the photographer acted ethically? 1. Yes 2. No 4._____

C. A TV cameraman films a man's arrest on charges of threatening citizens with a s gun. Following a police order to surrender, the man emerges from his hom completely nude. The film is aired that evening, revealing genitals.

5. According to principles of law, has the cameraman invaded the man's privacy? 1. Yes 2. No 5._____
6. According to standards of journalism, has the cameraman acted ethically? 1. Yes 2. No 6._____

D. A magazine photographer takes a picture of a sports fan during a football game. The fan knows the photographer's occupation and that he is taking the fan's picture. The fan's fly is open, and the picture is used to illustrate an article entitled, "A Strange Kind of Love."

7. According to principles of law, has the photographer invaded the fan's privacy? 1. Yes 2. No 7._____
8. According to standards of journalism, has the photographer acted ethically? 1. Yes 2. No 8._____

E. A TV cameraman films a police gambling raid at a hotel. An innocent bystander is mistakenly interrogated by police as the camera records the scene, later aired unedited. The bystander is not identified by name in the voiceover.

9. According to principles of law, has the cameraman invaded the bystander's privacy? 1. Yes 2. No 9._____
10. According to standards of journalism, has the cameraman acted ethically? 1. Yes 2. No 10._____

F. A magazine publisher illustrates an article on the bad risks of love at first sight ("100% sex attraction") with a picture of a man and wife seated at a public lunch counter, cheek to cheek. The picture was taken without the knowledge of the couple and used without their consent.

11. According to principles of law, has the publisher invaded the couple's privacy? 1. Yes 2. No 11._____
12. According to standards of journalism, has the publisher acted ethically? 1. Yes 2. No 12._____

G. A TV news cameraman films the entire act of a circus performer over his protests as the performer dives 12 stories into a tank of water six feet deep. The performance is broadcast on the evening news.

13. According to principles of law, has the news cameraman invaded the performer's privacy? 1. Yes 2. No 13._____
14. According to standards of journalism, has the news cameraman acted ethically? 1. Yes 2. No 14._____

H. A magazine publisher uses a drawing of a nude boxer, unidentified by name but recognizable as a former boxing champion, without his consent. The drawing is accompanied by a plainly fictional bit of doggerel.

15. According to principles of law, has the publisher invaded the boxer's privacy? 1. Yes 2. No 15._____
16. According to standards of journalism, has the publisher acted ethically? 1. Yes 2. No 16._____

Appendix B

A. The New York Supreme Court held that the restaurant was entitled to compensatory damages for trespass by the television camera crew. Television Channel 2 in New York, owned and operated by CBS, had sent a camera crew to visit a number of restaurants which had been cited for health code violations. The crew and a reporter entered Le Mistral restaurant about 2 p.m. July 6, 1972, with bright lights and with cameras rolling. This manner of newsgathering was standard operating procedure: the intent was to enter unannounced and to catch the occupants by surprise. Some patrons ducked under tables, others left without paying. The cameras continued to roll as the restaurant manager pushed the crew off the premises. At trial, CBS argued that the First Amendment granted immunity from damages. But the jury found that the defendant's conduct constituted a trespass, and the appellate court upheld that verdict while quoting from Dietemann v. Time, Inc: "The First Amendment is not a license to trespass . . ." Le Mistral v. CBS, 402 N.Y.S.2d 815 (1978).

B. The Florida Supreme Court held that a homeowner could not collect damages because a newspaper photographer's entry into a burned-out home, made at express invitation of police and fire officials, did not constitute unlawful trespass. The Florida Times-Union published on September 16, 1972, a photograph of a silhouette left on the floor after removal of a body from the burned-out home. The body was that of Cindy Fletcher, 17-year-old daughter of the plaintiff, who was away from home at the time of the fire. She learned of her daughter's death by viewing the published photograph. At trial, Florida Publishing Co. argued that consent to enter private property was implied by common custom, usage, and practice under these circumstances. The judge agreed and granted summary judgment for the newspaper, and the appellate court upheld that decision. Florida Publishing v. Fletcher, 319 So.2d 100 (1976).

C. The Idaho Supreme Court held that news media are immune from liability for invasion of privacy for reporting details of an arrest even if this results in disclosure of embarrassing private facts about the arrestee unless the disclosure was made with malice. Television station KTVB in Boise, Idaho, during a regular news broadcast on March 11, 1972, aired a film segment showing the arrest of Oren Taylor at his home. Taylor was taken from his home in the nude, and during the telecast his buttocks and genitals were briefly visible. At trial, KTVB argued that there is an absolute privilege to report truthfully all details of an event of current public interest without incurring liability for invasion of privacy. The jury disagreed and awarded Taylor $15,000, but the appellate court overturned this judgment. However, the appellate court ruled that the privilege to report is not an absolute privilege, as maintained by KTVB; rather, the privilege could be overcome by a showing of malice, and the case was remanded to the lower court to determine whether there was malice. Taylor v. K.T.V.B., Inc. 525 P.2d 984 (1976).

D. The U.S. District Court for the Western District of Pennsylvania held that the publication of a newsworthy photograph, taken in a public place, is protected by the First Amendment; and the court also held that a factually accurate public disclosure is not tortious when connected with a newsworthy event even though offensive to ordinary sensbilities. Sports Illustrated magazine, in its issue of August 5, 1974, published a photograph of John Neff as he danced about on a dugout from which the Pittsburgh Steelers were soon to emerge. Neff's picture was taken with his fly open as the photographer waited for the Steelers to appear. The publisher argued that the picture was taken with Neff's full knowledge and consent; Neff argued the reverse. The court found that the photograph had been taken with Neff's active encouragement and participation, and the court granted the publisher's motion for summary judgment. Neff v. Time, 406 F. Supp. 858 (1975).

Appendix B (Cont.)

E. The Florida Supreme Court held that is is not an invasion of privacy to publish a person's photograph with an account of a newsworthy event in which that person participated, even if unwillingly. A Miami television station, on January 3, 1954, showed a film depicting a gambling raid at the cigar shop of the Casablanca Hotel. John Jacova, an innocent bystander, was pictured as he was questioned by officers. Jacova was not named in the voiceover, but contended he was "depicted as being arrested as a gambler." The defendant television station argued that it was immune from suit for publishing his photograph in connection with a legitimate news item. The trial judge agreed, granting summary judgment to Southern Radio and Television Company, and the appellate court affirmed. Jacova v. Southern Radio and Television Company, 83 So. 2d 34 (1955).

F. The California Supreme Court held that a married couple had a cause of action for invasion of privacy against a magazine which published a photograph depicting them as persons whose only interest in each other was sex. A picture of John and Sheila Gill appeared in the May 1949 issue of Ladies Home Journal. Taken without their consent, it showed them as they sat cheek to cheek on the customers' side of the counter at their ice cream stand in Los Angeles. A caption identified their relationship as an example of love at first sight, termed "a bad risk." The article referred to love at first sight as founded upon 100% sex attraction. The Gills complained that they were depicted as dissolute and immoral persons, whereas they were happily married and of high moral reputation. Curtis Publishing Co. contended that the photograph served the public interest and did not seriously interfere with plaintiffs' privacy. The Supreme Court held that the photograph was not newsworthy, that the public interest did not require publication without consent, and that the photograph falsely depicted plaintiffs and disregarded their rights. Gill v. Curtis Publishing Co., 239 P. 2d 630 (1952).

G. The U.S. Supreme Court held that the First and Fourteenth Amendments do not immunize the press from damages for appropriating a performer's entire act. Hugo Zacchini, a "human cannonball," was performing at a fair in Burton, Ohio, on the night of August 31, 1972. Zacchini saw a cameraman for Scripps-Howard Broadcasting Company and asked him not to film the performance. The cameraman did so anyway, and the 15-second film clip was shown on the 11 p.m. newscast. Zacchini charged that the defendant had unlawfully appropriated and commercialized the performer's professional property. Scripps-Howard contended that First Amendment principles require that the right of privacy give way to the public right to be informed of matters of public interest. The Supreme Court ruled that while entertainment as well as news enjoys First Amendment protection, the Constitution is not a privilege to the press in these circumstances. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

H. The U.S. District Court for the Southern District of New York held that the New York statutory right of privacy protects one from unauthorized use of his likeness for trade purposes. Muhammad Ali sought an injunction against Playgirl magazine to withdraw the February 1978 issue from circulation, recover copies then for sale, and surrender printing plates used to reproduce in that issue a portrait recognizably that of Ali. The drawing depicted a boxer in full frontal nudity as he sat on a stool in a ring. The court ruled that injunctive relief was warranted because the magazine appeared to be usurping Ali's right to publicity as well as inflicting damage upon his marketable reputation. Ali v. Playgirl, Inc., 447 F. Supp. 723 (1978).